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No. 77-922

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHRYSLER CORPORATION, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–42a) is reported at 565 F.2d 1172. The opinion of the district court (Pet. App. 43a–57a) is reported at 412 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a–59a) was entered on September 26, 1977. The petition for a writ of certiorari was filed on December 27, 1977 (a Tuesday following a holiday) and was granted on March 6, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether a private party has a right, under the Freedom of Information Act, to prevent a federal agency from disclosing materials that are exempt from mandatory disclosure under the Act.

2. Whether 18 U.S.C. 1905 requires an injunction against the disclosure, authorized by agency regulations, of assertedly confidential information submitted to a federal agency.

3. Whether judicial review of an agency's decision to disclose assertedly confidential information should be conducted on the administrative record and governed by the standards of review in the Administrative Procedure Act.

STATUTES AND REGULATIONS INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * * *

> * * * * *
>
> (b) This section does not apply to matters that are—
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

2. 18 U.S.C. 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income,

profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

3. 5 U.S.C. 301 provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

4. The pertinent disclosure regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. 60–40.1 to 60–40.4, are reproduced at Pet. App. 62a–65a.

STATEMENT

1. Petitioner has contracts with a number of federal agencies, including the Department of Defense (App. 132–133). As a condition of doing business with the federal government, petitioner agreed not to discriminate against any of its employees or applicants for employment on the basis of race, color, religion, sex, or national origin. In addition, petitioner agreed to take affirmative action to ensure that applicants and employees are treated in a non-discriminatory

fashion. These agreements are included in each contract between petitioner and any federal agency, as is required by Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303.

Petitioner must submit an annual Employer Information Report, known as an EEO–1 report, to the Defense Supply Agency, a branch of the Department of Defense.[1] This report helps the Agency to monitor petitioner's compliance with its contract provisions. The EEO–1 report states the number of women and minority group members that petitioner employs in its domestic operations as a whole and in each of its domestic facilities.[2] 41 C.F.R. 60–1.7. In addition,

[1] The Defense Supply Agency has recently been renamed the Defense Logistics Agency. We refer to it here by its former name, which was in use throughout the period before this litigation began.

[2] The reports are submitted to the Defense Supply Agency as the result of a series of delegations authorized by Executive Order 11246 and by Department of Labor Regulations. The Executive Order delegates responsibility for administering contractors' equal employment agreements to the Secretary of Labor (Section 201), and further provides that the Secretary of Labor may redelegate his functions under the order (except for his authority to promulgate general rules and regulations) to any other executive agency (Section 401). The Secretary has delegated the administration of the Order to the Office of Federal Contract Compliance Programs (OFCCP), an office within the Department of Labor (41 C.F.R. 60–1.2). The Director of the OFCCP has in turn designated various federal agencies as "compliance agencies," having primary responsibility for assuring contractors' compliance with their equal employment responsibilities (41 C.F.R. 60–1.6). The Defense Supply Agency has been designated as petitioner's compliance agency.

petitioner must prepare and make available to the Agency on request written Affirmative Action Programs, which detail the steps petitioner has taken and intends to take to guarantee equal employment opportunity for employees and job applicants in petitioner's domestic facilities. 41 C.F.R. 60–1.40, 60–2.1, 60–60.2(a) (App. 133–135). The Affirmative Action Programs contain information on staffing patterns, pay scales, actual and anticipated shifts in employment, and related employment matters. They also contain goals and projections for employment of minority group members and women, as well as analyses by petitioner of its success in meeting its objectives (App. 134).

The Defense Supply Agency conducts periodic "compliance reviews" of the employment practices of those contractors for which it serves as the compliance agency. In the course of these reviews, the Agency examines the contractors' EEO–1 forms and Affirmative Action Programs, and it conducts on-site inspections of their facilities. Following each compliance review, the Agency prepares a "Compliance Review Report," which contains information supplied by the contractor, an analysis of its performance in meeting its equal employment responsibilities and goals, and, if necessary, recommendations for sanctions or corrective measures. 41 C.F.R. 60–60.3. The Agency also is responsible for investigating and seeking to resolve complaints of violations of the Executive Order. 41 CFR. 60–1.24(c). It must file a "Complaint Investigation Report" with the OFCCP following its investigation of each such complaint. 41 C.F.R. 60–1.24(d).

2. Under the authority of Executive Order 11246 and 29 C.F.R. 70.71, the Secretary of Labor has promulgated regulations providing for public access under certain circumstances to records of the OFCCP and its various compliance agencies. The regulations, which are designed to "implement * * * the Freedom of Information Act," provide that "[i]t is the policy of the OFCC[P] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. 60–40.1. In accordance with this policy, the regulations provide that the OFCCP will disclose records "obtained or generated pursuant to Executive Order 11246 (as amended) * * * if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies, except in the case of records disclosure of which is prohibited by law." 41 C.F.R. 60–40.2(a). The regulations thus effectively provide that the OFCCP and the compliance agencies will not ordinarily withhold information on the basis of the exemptions from mandatory disclosure under the Freedom of Information Act.

The regulations call for the disclosure of "all contract compliance documents," 41 C.F.R. 60–40.2(b),

with certain exceptions. The exceptions include: (1) the portions of Affirmative Action Programs "which would be confidential commercial or financial information" because they indicate that a contractor plans major changes in its personnel requirements, which have not been announced to the public; (2) the portions of Affirmative Action Programs that describe staffing patterns or pay scales, if their release "would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee"; and (3) compliance investigation files, including the standard Compliance Review Report, to the extent that the files contain "trade secrets and confidential commercial or financial information" or certain other types of sensitive materials. 41 C.F.R. 60–40.3(a)(1), (2), (5). Each of these records "should be withheld," according to the regulations, "if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC[P] or the Compliance Agencies." 41 C.F.R. 60–40.3(a).

3. In 1975 the Defense Supply Agency received two Freedom of Information Act (FOIA) requests for agency records pertaining to petitioner. The first request, submitted by a person who had filed a racial discrimination suit against petitioner, sought disclosure of the 1974 Affirmative Action Program and

an October 1974 Complaint Investigation Report for petitioner's Newark, Delaware, assembly facility (App. 104–107). The second request, submitted by an attorney for the plaintiff in a pending sex discrimination action against the company, sought disclosure of the current Affirmative Action Program and Compliance Review Report for petitioner's Hamtramck, Michigan, plant (App. 101).

In each instance, the Agency informed petitioner about the request and provided petitioner an opportunity to voice any objections it might have to disclosure of the materials (App. 95, 114). Petitioner objected to disclosure of the materials on various grounds, including the assertion that the materials contained confidential corporate information, the release of which would adversely affect petitioner's business interests (App. 76–81, 84–87, 118–121).

After reviewing the materials and petitioner's objections, the Agency concluded that certain portions of the requested materials should be withheld, but that other portions should be disclosed under the OFCCP's disclosure regulations (App. 61–66, 122–123). As to the materials that were withheld, the Agency invoked the exemptions from mandatory disclosure in the FOIA, 5 U.S.C. 552(b) (App. 61–66, 122–123).

4. Before the Agency disclosed the materials relating to the Delaware plant, petitioner brought this action in the United States District Court for the District of Delaware, seeking an injunction and

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declaratory judgment barring the release of the materials. The court issued a temporary restraining order prohibiting release of the records (App. 2–3). Prior to the disclosure of the materials relating to the Michigan plant, petitioner amended its complaint to include those documents within its prayer for injunctive relief (App. 4–17). Petitioner obtained a temporary restraining order barring release of those records as well (App. 54–57, J.A. 112–113),[3] and both temporary restraining orders were extended until the determination of the case on the merits (J.A. 7–8, 10–11, 115, 124).

Petitioner's complaint alleged that disclosure of any portion of the Affirmative Action Programs, the EEO–1s, or any Complaint Investigation Report or Compliance Review Report pertaining to any of its facilities is prohibited by exemptions 3, 4, 5, and 7 to the Freedom of Information Act, 5 U.S.C. 552(b)(3), (4), (5), (7); by 18 U.S.C. 1905; by Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 264, as amended, 42 U.S.C. 2000e–8(e); by 44 U.S.C. 3508; and by various Department of Labor Regulations, 29 C.F.R. 70.21, 70.22, 70.24, 70.31, and 41 C.F.R. 60–40.3(a).

After a *de novo* evidentiary hearing, the district court found that, of all the information the Agency proposed to release, only the "manning tables" for petitioner's Delaware plant fell within any of the exemptions to mandatory disclosure under the FOIA (Pet. App. 49a–52a). The "manning tables" were described as lists of petitioner's internally used job titles and the number of persons who performed each job (*id.* at 50a). Because it concluded that the "manning tables" contained confidential commercial information, the release of which could cause petitioner substantial competitive harm, the court held that the tables are exempt from mandatory disclosure under exemption 4 of the Freedom of Information Act (*id.* at 49a–52a).

[3] "J.A." refers to the joint appendix in the court of appeals.

Having found that the information in the manning tables falls within exemption 4, the court held that the FOIA is therefore inapplicable. Nonetheless, the court held that disclosure of the materials is prohibited by a Department of Labor regulation, 29 C.F.R. 70.21(a), which forbids the Agency to disclose information that would expose the disclosing employee to criminal liability under 18 U.S.C. 1905 (Pet. App. 52a–53a). That statute makes it unlawful for a federal employee to disclose certain types of confidential information "to any extent not authorized by law." Because it had found that the manning tables contain confidential commercial statistical data, the court concluded that disclosure of the tables would subject a federal employee to criminal liability under 18 U.S.C. 1905, and that the disclosure is therefore prohibited by the Department of Labor regulation.[4]

Accordingly, the district court enjoined respondents from disclosing the "manning table" portions of the two Affirmative Action Programs in question (Pet. App. 67a). The court concluded that the remainder of

[4] The court rejected petitioner's argument that disclosure is barred by 42 U.S.C. 2000–8(e) (Pet. App. 55a).

the requested materials, which it found do not contain confidential commercial or financial information, are not protected from public disclosure and could therefore be released by the Agency (*id.* at 49a).

5. The court of appeals held that neither exemption 4 of the FOIA nor 18 U.S.C. 1905 prohibits disclosure of any of the materials at issue. The FOIA exemptions, the court held, are permissive rather than mandatory, and an agency is therefore not barred from disclosing materials that fall within one of the exemptions. The court of appeals pointed out that 18 U.S.C. 1905 bars federal officers or employees from disclosing confidential business information only if the disclosure is "not authorized by law." The OFCCP regulations permit disclosure of materials in the possession of compliance agencies, and the court held that those regulations are "authorization by law" within the scope of 18 U.S.C. 1905. Consequently, it concluded, Section 1905 does not bar disclosure in this case (Pet. App. 22a–25a, 27a–30a). For the same reason, the court held that disclosure would not violate Department of Labor regulations, which, like Section 1905, prohibit only disclosures "not authorized by law" (Pet. App. 36a). In any event, the court held that neither the FOIA nor Section 1905 establishes a private cause of action under which petitioner could seek injunctive or declaratory relief (Pet. App. 25a, 30a–31a).[5]

[5] The court also rejected petitioner's contention that disclosure of the Affirmative Action Programs and EEO–1s is prohibited by 42 U.S.C. 2000e–8(e) (Pet. App. 31a–33a). Petitioner has not challenged that aspect of the court of appeals' decision in this Court.

Finally, the court held that in reviewing an agency's decision to release assertedly confidential materials, the district court should not conduct a *de novo* review of the agency's action; it instead must examine the administrative record to determine whether the agency's decision to disclose is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 6 U.S.C. 706(2)(A). Finding the record in this case inadequate to permit meaningful judicial review under this standard, the court remanded the case to the Agency for further proceedings (Pet. App. 36a–40a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Six of the seven Freedom of Information Act (FOIA) cases that this Court has decided have involved the exemptions to the Act's disclosure requirements. In each of these six cases, a private party sought records from a federal agency, and the agency resisted disclosure, asserting a right to withhold on the basis of one or more of the exemptions.[6]

Here the opposite is the case. A federal agency preparing to disclose materials requested under the

[6] The six cases are *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (exemption 1); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (exemptions 5 and 7); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (exemption 5); *Administrator, Federal Aviation Administra-*

FOIA was sued by a private party seeking to bar disclosure of the materials. Cases such as this one, in which private parties have sought to block the release of federal agency records obtained from or pertaining to them commonly have been referred to as "reverse FOIA" cases.[7]

The basic question posed in most "reverse FOIA" cases is whether an agency, as a matter of discretion, may disclose records that it would be entitled to withhold under one or more of the exemptions to the FOIA. We submit that an agency may make such discretionary disclosures so long as the disclosures are not contrary to some law—other than the FOIA—that independently prohibits disclosure. Because decisions to disclose information are final agency action, how-

tion v. *Robertson*, 422 U.S. 255 (exemption 3); *Department of the Air Force* v. *Rose*, 425 U.S. 352 (exemptions 2 and 6); *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978 (exemption 7). The seventh case, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, involved the question whether a district court could stay proceedings before the Renegotiation Board pending resolution of a FOIA claim presented to the Board.

[7] The first "reverse FOIA" case was decided in 1973. In May 1978 more than 100 such cases were pending. Almost all of them involved business documents. See H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 53-54 (1978). A catalogue of the leading "reverse FOIA" cases can be found in Freedom of Information Committee, *Freedom of Information Case List* 68-71 (1978 ed.), and Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 589-590 n. 7 (1977).

ever, they are subject to judicial review, on the administrative record, under the standards of Section 10(e) of the Administrative Procedure Act, now 5 U.S.C. 706(2)(A).

I

The Freedom of Information Act is a disclosure statute, not a withholding statute. Although it provides that agencies may refuse to disclose records falling within one or more of nine specific exemptions, it does not require the agency withhold any record. Congressional concern for confidentiality of both business and personal information underlay the decision to add exemptions 4 and 6 to the Act. But both the language of the Act and its legislative history make clear that those exemptions, like the other seven exemptions, were intended to be permissive rather than mandatory. Subsection (b) of the FOIA provides that the Act "does not apply" to materials that fall within the exemptions. Accordingly, the FOIA does not forbid agencies from disclosing exempt materials. Unless some other statute forbids disclosure, agencies are free to disclose any information in their possession.

II

The second statute on which petitioner founds its asserted right to bar the proposed disclosures is the Trade Secrets Act, 18 U.S.C. 1905. That criminal statute prohibits disclosure by agency employees

and officers of trade secrets and other confidential business information except as "authorized by law."

Even if the materials at issue in this case fall within the reach of the Trade Secrets Act, their disclosure would not violate that Act, since disclosure was "authorized by law." Court orders, court rules, or agency regulations may provide the authorization by law of which Section 1905 speaks. Since the OFCCP disclosure regulations authorize release of assertedly confidential records in appropriate circumstances, disclosure of the records involved in this case is "authorized by law" within the meaning of Section 1905.

The OFCCP disclosure regulations were promulgated under the authority of Executive Order 11246, which provides that the Secretary of Labor may issue regulations he deems necessary and appropriate to the enforcement of the policies of the Order. In addition to that authority, the regulations are valid under the executive department "housekeeping" statute, 5 U.S.C. 301, which permits the executive departments to promulgate appropriate regulations to govern the "custody, use, and preservation of its records, papers, and property."

Even if the disclosure of records in a particular case violates the Trade Secrets Acts, a private plaintiff such as petitioner would have no right of action under that Act to prevent disclosure of the records. Instead, the private plaintiff's remedy would be through judicial review of the agency's action under the Administrative Procedure Act. A private civil cause of action rarely arises by implication from a criminal statute. Nothing in the language or legislative history of Section 1905 suggests congressional intent to create a private cause of action, and Section 1905 was not designed for the special benefit of a particular class. Accordingly, Section 1905 does not create a right of action under which private parties may seek to enjoin impending violations of that Act.

III

Petitioner may obtain review of the disclosures under the Administrative Procedure Act. Review under that Act, however, is conducted on the basis of the administrative record, and agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

Petitioner contends that review in the district court should be *de novo*; it maintains that agency fact-finding procedures are inadequate to establish whether particular business information is confidential within the meaning of exemption 4 and whether, on balance, the public interest would be served by its disclosure. Yet Congress has concluded that the short time period within which an agency must determine whether particular records must be disclosed is sufficient; moreover, once the agency has determined that records are exempt, the stringent time restrictions of the FOIA

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do not apply. The inquiry whether the records should be released as a discretionary matter can be made within whatever period the agency deems sufficient to consider all issues bearing on the propriety of disclosure. If the agency's decision is not based on a fair consideration of the relevant factors, that decision can be challenged on review as being "arbitrary and capricious." Possible infirmities in the agency proceedings in a particular case, however, do not justify the highly unusual remedy of *de novo* review in the district courts.

ARGUMENT

I

THE FREEDOM OF INFORMATION ACT DOES NOT AUTHORIZE A COURT TO PREVENT A FEDERAL AGENCY FROM RELEASING AGENCY RECORDS

A. THE FREEDOM OF INFORMATION ACT EXEMPTIONS ARE PERMISSIVE RATHER THAN MANDATORY

1. The FOIA "does not apply to" exempted materials

The basic policy of the FOIA is "disclosure, not secrecy." *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361. The statute replaced former Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002, which "was generally recognized as falling far short of its disclosure goals and had come to be looked upon more as a withholding statute than a disclosure statute." *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 79. In sharp contrast to Section 3, the FOIA established a presumption in favor of disclosure and created "a judicially enforceable public

right to secure * * * information from possibly unwilling official hands." *Id.* at 80; see *National Labor Relations Board* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 136; *National Labor Relations Board* v. *Robbins Tire & Rubber Co.,* No. 77–911, decided June 15, 1978; slip op. 21.

Recognizing that there are legitimate reasons for agencies to conclude that certain types of records should not be released, Congress created nine exemptions from compelled disclosure. In its first encounter with the FOIA, this Court characterized the exemptions as permissive, noting that they were intended "to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed" (*Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 79), and that they represent "the types of information that the Executive Branch must have the option to keep confidential, if it so chooses" (*id.* at 80). See also *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, 262. More recently, the Court has made the same observation in somewhat different terms, noting that the Act's exemptions are "exemptions from *compelled disclosure.*" *Department of the Air Force* v. *Rose, supra,* 425 U.S. at 361 (emphasis added). The exemptions thus provide a harbor from forced disclosure in certain limited situations if, but only if, the agency choses to invoke them.

The Court's construction of the statute in *Mink* is practically compelled by the language Congress chose.

Section 552(b) states that the statute "does not apply to matters" described by the nine exemptions. See *National Labor Relations Board* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 147–148. If the FOIA means what it so plainly says, then it leaves federal agencies with whatever authority and obligations other statutes create concerning the exempted matters. The FOIA never requires withholding of exempted materials because it "does not apply" to them.

2. The legislative history shows that the exemptions give officials discretion concerning release

The legislative history and the contemporaneous and subsequent construction of the FOIA support our reading of the statutory language.

Both the House and Senate Reports on the Act described the exemptions in permissive terms. The House Report stated that the exemptions would provide "workable standards for the categories of records which may be exempt from public disclosure," and it added that because there may be legitimate reasons for non-disclosure, the Act "is designed to permit non-disclosure in such cases." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2, 6 (1966). The Senate Report, similarly, explained that the exemptions list the "specific and limited types of information that may be withheld;" it described the policy of the Act as being that all agency records "are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret" by one of the

exemptions. S. Rep. No. 813, 89th Cong., 1st Sess. 5, 10 (1966).[8]

Shortly after the Act became effective, Professor Kenneth Culp Davis, a leading authority on the Act, wrote:

> The Act contains no provision forbidding disclosure. It requires disclosure of all records except what is "specially" [exempted] within the nine exemptions and other provisions. The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders, or instructions.

Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chi. L. Rev. 761, 766 (1967). Other commentators have reached the same conclusion. See Clement, *The Rights of Submitters To Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit,* 55 Tex. L. Rev. 587, 591–602 (1977); Project; *Government Information and the Rights of Citizens,* 73 Mich. L. Rev. 971, 1158–1159 (1975); Note, *Protection From*

[8] In 1964, two years before the FOIA was enacted, the Senate Judiciary Committee published its first report on the proposed legislation. S. Rep. No. 1219, 88th Cong., 2d Sess. (1964). That Committee report stated (*id.* at 15):

"[A]ll materials of the Government are to be made available to the public by publication or otherwise unless explicitly *allowed* to be kept secret by one of the exemptions * * *" [emphasis added].

Government Disclosure—The Reverse-FOIA Suit, 1976 Duke L. J. 330, 333–339; Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 Nw. U. L. Rev. 995, 1007 (1976).

Similarly, in a memorandum explaining the purpose and operation of the Act to the federal agencies, the Attorney General advised that:

> Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 2–3 (1967).

Since the passage of the FOIA, Congress has underscored the permissive nature of the exemptions in the course of its oversight of the operation of the Act. In September 1972 the House Committee on Government Operations submitted a report of its in-depth study of the administration of the then six-year-old statute. H.R. Rep. No. 92–1419, 92d Cong., 2d Sess. (1972). The report stated that "[w]ithholding of information by government under the act is permissive not mandatory * * *." *Id.* at 3, 14. The report criticized the Cost of Living Council and its subsidiary units for adopting regulations flatly prohibiting disclosure of exempt information. Noting that the regulations were amended to provide for the release of otherwise

exempt information where disclosure would be in the public interest, the report applauded the revisions as bringing the regulations "into conformity with the spirit of the Freedom of Information Act." *Id.* at 14–15.

The House Committee's 1972 Report provided the groundwork for the extensive revisions of the FOIA in 1974. See. H.R. Rep. No. 93–876, 93d Cong., 2d Sess. 4 (1974). The 1974 amendments (88 Stat. 1561) were the product of a full-scale legislative review of the administration and operation of the Act. Where Congress determined that the agencies or the courts were administering or interpreting the Act in a manner inconsistent with the original legislative intent or contrary to the Act's basic purposes, Congress adopted corrective measures.[9] On the other hand, where the congressional review disclosed that the agencies had administered the Act in a manner consistent with the legislative purpose, Congress left the Act unchanged.

Both the Senate and the House Reports on the 1974 amendments reflected the understanding that the exemptions were permissive rather than mandatory. The Senate Report, restating the point made by the Attorney General's 1967 memorandum, explained:

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[9] For example, in the 1974 amendments Congress removed the absolute ban on *in camera* inspection of certain materials; it amended exemptions 1 and 7 to restore what it deemed to be the original congressional intent; and it added detailed procedural provisions governing the administrative handling of disclosure requests.

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information should be withheld.

S. Rep. No. 93–854, 93d Cong., 2d Sess. 6 (1974) (emphasis in original). See also H.R. Rep. No. 93–221, 93d Cong., 1st Sess. 59 (1973); H.R. Rep. No. 93–876, *supra,* at 4.[10]

Petitioner dismisses the legislative history of the 1974 amendments as "entitled to little if any weight" in determining whether Congress intended the exemptions to the FOIA to be mandatory or permissive (Br. 18–19 n. 18). But as this Court recognized in *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 267, the 1974 amendments are significant guides to the interpretation of the Act, including both the amended portions and those that were left intact.

[10] In reporting the proposed Amendments to the full Senate, Senator Kennedy, the floor manager of the bill, reviewed the purposes and history of the Act and observed (120 Cong. Rec. 17016 (1974)):

"[I]t is important to point out that the act [FOIA] attempts to strike a proper balance between disclosure and non-disclosure. * * * Congress certainly did not intend the exemptions * * * to be used to prohibit disclosure or to justify automatic withholding."

The Court noted in *Robertson* that the administration of the FOIA was made subject to "continuing close scrutiny" (*ibid.*) by the appropriate congressional committees. See 5 U.S.C. 552(d). When the House Committee conducted its detailed review of the Act in 1972, and when Congress enacted the 1974 amendments, each oversight committee recognized that the exemptions had been and still were intended to be permissive. In *Robertson* the Court gave weight to the implicit reaffirmation of the continuing validity of exemption 3; the express reaffirmation of the original understanding that the FOIA exemptions were to be permissive is entitled to even greater weight.[11]

Familiar principles of statutory interpretation underscore the significance of the 1974 amendments. Legislative discussions of the meaning of a statute are entitled to significance when they occur in connection with amendments to the statute. This is so because the discussions show the assumptions that give meaning to the amendments and their relationship to the statute, and because the fact that the amendments passed shows that Congress as a whole adopted the views urged on it. Compare *Califano* v. *Sanders,* 430 U.S. 99, with *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132, and *United States* v. *Wise,* 370 U.S. 405, 411. Given Congress' close oversight of the administration of the FOIA, and its amendments to the

[11] Acting in its oversight capacity, the House Committee has again reaffirmed its view that the exemptions are permissive. H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 56–57 (1978).

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Act in 1974 to alter administrative practices and judicial decisions that, in Congress' view, did not accurately carry out the Act, there is a strong inference that Congress meant to adopt or endorse the principle that the exemptions are permissive rather than mandatory. See *Lorillard* v. *Pons*, No. 76–1346, decided February 22, 1978, slip op. 5; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90.

The courts and federal agencies alike have concluded that the FOIA exemptions permit discretionary disclosure of exempt materials. All the courts of appeals that have considered the issue have determined that the exemptions are permissive,[12] and all the executive departments and a number of independent agencies have adopted regulations permitting dis-

[12] In addition to the decision of the court of appeals in this case, see *Sears, Roebuck & Co.* v. *Eckerd*, 575 F. 2d 1197 (C.A. 7), petition for a writ of certiorari pending, No. 78–97; *General Dynamics Corp.* v. *Marshall*, 572 F. 2d 1211 (C.A. 8), petition for a writ of certiorari pending, No. 78–79; *Pennzoil Co.* v. *Federal Power Commission*, 534 F. 2d 627 (C.A. 5); *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F. 2d 935 (C.A. D.C.); *Moore-McCormack Lines, Inc.* v. *I.T.O. Corp., of Baltimore*, 508 F. 2d 945, 950 (C.A. 4). But see *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190 (C.A. 4), certiorari denied *sub nom. Brown* v. *Westinghouse Electric Corp.*, 431 U.S. 924. Although the Fourth Circuit recognized that invocation of the exemptions is "ordinarily discretionary with the agency" (*id.* at 1197), it added that the exercise of that discretion is subject to "any clear declarations of legislative policy against disclosure as reflected in an exemption of the Act itself * * *" (*ibid.*). *Westinghouse* held that exemption 4, but apparently no other part of the FOIA, forbids disclosure.

closure, under appropriate circumstances, of materials falling within one of the FOIA exemptions.[13]

3. The exemptions pertaining to private interests should be treated like the other exemptions

Petitioner agrees that even if the exemptions are generally permissive, exemption 4 must be construed as requiring withholding because that exemption, like exemption 6,[14] was designed to protect private interests, not the interests of government agencies.

To be sure, exemptions 4 and 6 deal with materials somewhat different from those protected by the other exemptions. Exemptions 4 and 6 were included in the FOIA in recognition of the legitimate interests of

[13] See 22 C.F.R. 6.2(a), 6.6 (Department of State); 31 C.F.R. 1.2(c)(4) (Department of the Treasury); 32 C.F.R. 286.4(b) (Department of Defense); 28 C.F.R. 16.1(a) (Department of Justice); 43 C.F.R. 2.13(d) (Department of the Interior); 7 C.F.R. 1.1 (Department of Agriculture); 15 C.F.R. Part 4, App. A, Section 5.02(d)(1) (Department of Commerce); 29 C.F.R. 70.11(b) (Department of Labor); 45 C.F.R. 5.74 (Department of Health, Education, and Welfare); 24 C.F.R. 15.21 (Department of Housing and Urban Development); 49 C.F.R. 7.61 (Department of Transportation); 10 C.F.R. 202.9(b) (Department of Energy).

Examples of agency regulations providing for discretionary disclosure under various standards include 16 C.F.R. 4.11(a)(1)(iv)(A) (Federal Trade Commission); 47 C.F.R. 0.457, 0.461 (Federal Communications Commission); 40 C.F.R. 2.101(a), 2.119(b) (Environmental Protection Agency); 10 C.F.R. 9.10(c) (Nuclear Regulatory Commission); and 16 C.F.R. 1015.15 (Consumer Product Safety Commission).

[14] Exemption 6 permits agencies to refuse disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6)).

privacy and confidentiality of persons dealing with the government. See. S. Rep. No. 813, *supra,* at 9; H.R. Rep. No. 1497, *supra,* at 10. Yet none of the legislative history suggests that exemptions 4 or 6 were to be treated differently from the other exemptions or that federal agencies would be obligated to invoke exemptions 4 or 6 when faced with a request for materials arguably falling within the reach of those exemptions. Indeed, even the references to the privacy and confidentiality interests on which petitioner heavily relies often were made in the context of characterizations of the exemptions as permissive. The 1966 Senate Report, for example, states that the Act "sets up workable standards for what records should and should not be open to public inspection. In particular, it [refers to] specific and limited types of information that may be withheld." S. Rep. No. 813, *supra,* at 5. Similarly, although the foreword to the Attorney General's 1967 memorandum on the Act states that the law "gives assurance to individual citizen that his private rights will not be violated," and that "materials such as * * * trade secrets must remain outside the zone of accessibility," the memorandum specifically adopts the view that the exemptions to the Act are permissive. *Attorney General's Memorandum, supra,* at III–IV.[15]

[15] Any doubt that exemption 4 was intended to be permissive was dispelled by 1974. In the reports that led to the 1974 amendments, both the House and Senate Committees had included exemption 4 in characterizing the exemptions as permissive. S. Rep. No. 93–854, *supra*, at 5; H.R. Rep. No. 92–1419, *supra*, at 14. The Senate Committee, moreover, noted approval of several agency regulations that provided for discretionary disclosure of exempt information, including information falling within exemption 4, adding that "[t]his approach was clearly intended by Congress in passing the FOIA." S. Rep. No. 93–854, *supra*, at 6.

Petitioner's attempt to distinguish between the "private" documents and interests addressed by exemptions 4 and 6 and the "public" documents and interests protected by the other seven exemptions rests on a false dichotomy. Information reaches the files of federal agencies because it has to do with the business of government. The government is not, for example, interested in petitioner's "manning tables" simply because it wants to know how to make automobiles. Documents submitted by private parties may show what the government requires of its contractors and how it enforces those requirements. Information obtained from private parties may tell more about the workings of government than about the status of the submitter; materials that are still in the form in which they were submitted may reveal as much about

Various statements made in the coure of the 1963 hearings on the bill which, in amended form, became the FOIA are of limited relevance, since those statements were made at the time when the bill did not contain exemptions for confidential personnel or business information. Freedom of Information: Hearings on S. 1666 and S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963). The statements on which petitioner relies (Br. 15–16) were made in the context of suggestions that exemptions with respect to these kinds of materials should be added, as they subsequently were.

the "'nature, scope and procedure of federal activities'" (*Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17) as would the disclosure of materials that were generated wholly within the agency.[16]

The "public" aspects of putatively "private" documents are well illustrated in this case. Petitioner's obligations as a government contractor entail the elimination of employment discrimination. Regulations and contracts require the agencies with which petitioner deals to make sure that petitioner satisfies its obligations. Disclosure of the materials that petitioner has furnished under the equal employment program not only could demonstrate the extent to which petitioner is satisfying its obligations but also could shed light on the manner in which the government is enforcing its equal employment opportunity programs. See H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 9 (1978).

Moreover, as petitioner observes (Br. 29–33), exemption 4 serves not only to protect purely private interests but also to safeguard the government's

[16] Similarly, materials generated wholly within an agency may reveal much about private activities. Documents classified as "secret," and thus exempt from mandatory disclosure under exemption 1, may contain information on manufacturing processes or specifications of items secured by the armed forces and made by private contractors. Inter-agency memoranda (covered by exemption 5), investigatory records compiled for law enforcement purposes (covered by exemption 7), reports on financial institutions (covered by exemption 8), and geological and geophysical information (covered by exemption 9) may be predominantly or even exclusively reports on or copies of information submitted by private persons.

ability to obtain necessary information. *National Parks and Conservation Association* v. *Morton*, 498 F. 2d 765, 767–770 (C.A. D.C.).[17] The question whether release of potentially exempt material will undermine the agency's ability to elicit information in the future is one to which the agency is likely to be keenly sensitive; this interest should serve in most instances to dissuade the agency from releasing materials that may be significantly harmful to the private party. Only the agency's determination that a public interest served by disclosure outweighs whatever barriers to cooperation disclosure creates would lead the agency to disclose information covered by exemption 4. The OFCCP regulations at issue in this case recognize the dangers inherent in the release of truly sensitive information and require the comparison we have identified. The regulations provide that in determining whether to disclose exempt information, the Agency must consider whether disclosure would "impede any of the functions of the OFCC[P] or the Compliance Agencies" (41 C.F.R. 60–40.2(a)).

The evaluation whether particular disclosures are likely to hinder agency efforts to obtain cooperation from private parties in the future is peculiarly within the agency's competence to determine. As this Court noted in a related context in *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 290, the es-

[17] Exemption 3 may serve much the same function. See *Administrator, Federal Aviation Administration* v. *Robertson*, *supra*, 422 U.S. at 266–267.

tablished principle that administrative agencies should be free to fashion their own rules of procedure, including rules permitting disclosure of assertedly confidential materials

> is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved. * * *
>
> To permit federal district courts to establish administrative procedures *de novo* would, of course, render nugatory Congress' efforts to insure that administrative procedures be designed by those most familiar with the regulatory problems involved.

A balance must be struck between the public interest served by disclosure and the public and private interests served by maintaining confidentiality, and the agency that depends on the flow of information is best situated to strike that balance in the first instance.

B. THE FREEDOM OF INFORMATION ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION TO ENJOIN DISCLOSURE

Petitioner must establish two propositions in order to prevail on its argument that it is entitled, under the FOIA, to judicial relief against the disclosures the Agency proposes to make: first, that the FOIA requires agencies to withhold exempt materials; and second, that there is a private right of action to enforce any requirement of withholding. Petitioner all but ignores the second of these.

As the court of appeals observed (Pet. App. 23a–24a), the question whether the exemptions to the FOIA are permissive is closely related to the question whether there is a private right of action to enjoin disclosure. If the exemptions are permissive, there obviously is no right to require that they be invoked. Nonetheless, certain factors point with particular force to the unavailability of an action based on the FOIA to enjoin disclosure, and those factors deserve separate analysis.

1. The structure of the Act indicates that Congress did not contemplate a private right of action to bar disclosure. Subsection (a) of the Act, 5 U.S.C. 552(a), states the general right of the public to obtain records and sets out procedures for enforcing that right. Subsection (b) then lists the nine exemptions to the Act. As we have noted, with respect to records falling within the exemptions, subsection (b) states that the Act "does not apply." The enforcement and judicial review provisions of subsection (a) therefore do not create any right to judicial review or relief with respect to exempt materials.

2. Subsection (a) of the Act gives a right of action only to persons requesting materials. District courts have jurisdiction over suits "to enjoin the agency from withholding agency records and to order the production of any records improperly withheld from the complainant" (5 U.S.C. 552(a)(4)(B)). The procedural provisions of the Act are directed to enforcing the Act's disclosure obligations (see 5 U.S.C. 552(a)(3), 552(a)(4)(A), 552(a)(4)(F)). The statute does not

authorize suits by submitters of information, and the omission is entirely consistent with the FOIA's emphasis on disclosure rather than confidentiality.

3. As this Court has observed, "[the] express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature." *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412, 419. Although this implication must yield to "clear, contrary evidence of legislative intent" (*National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458), nothing in its legislative history suggests that the FOIA was intended to authorize courts to bar disclosure of information.[18]

4. The enactment of the Privacy Act of 1974, 5 U.S.C. 552a, supports the view that Congress did not understand the FOIA to have created a private right of action to bar agency disclosure of confidential information. The Privacy Act provides an express right of action for any natural person whenever an agency improperly discloses records relating to that person. 5 U.S.C. 552a(g)(4). If the FOIA had created a private right of action to bar disclosure of exempt materials, this aspect of the civil remedies section of

[18] The court of appeals put the matter well: "[W]hile the Congressional concern over confidentiality of submitter information is clear, an intention to make mandatory the non-disclosure of exempt information is less so, and the evidence of an intent to create a submitter cause of action is practically nonexistent" (Pet. App. 22a–23a).

the Privacy Act would have been unnecessary, for many of the records the Privacy Act was designed to keep confidential would fall within exemption 6 of the FOIA. See 5 U.S.C. 552a(a)(4), 552a(b)(2). Moreover, even the Privacy Act does not authorize injunctive relief against agency disclosure of personal records; Congress instead provided only a limited damages remedy.[19] If the FOIA authorizes courts to enjoin disclosure, the carefully formulated and limited remedies provided under the Privacy Act would be overridden by a much broader implied remedy from the older statute.

In sum, the factors to which this Court looks in determining whether a private right of action should be implied from an otherwise silent statute militate strongly against finding such a right in the FOIA. Persons seeking to force agencies to withhold records are not in the "class for whose especial benefit the statute was enacted." *Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33, 39. The FOIA was enacted to benefit the class of persons seeking access to agency records. Nor is there any "indication of legislative intent, explicit or implicit," to create a remedy on be-

[19] Injunctive relief is available under the Privacy Act only when the agency refuses to provide a person with access to records pertaining to him, 5 U.S.C. 552a(g)(3)(A), 552a(g)(1)(B), 552a(d)(1). When an agency improperly discloses individual records, the affected person has only a right to actual damages sustained as a result of the disclosure, and then only on a showing that the agency acted "in a manner which was intentional or willful." 5 U.S.C. 552a(g)(4).

half of submitters of information. *Cort* v. *Ash*, 422 U.S. 66, 78. And, finally, it is inconsistent "with the underlying purposes of the legislative scheme" (*ibid.*) to imply such a remedy for parties seeking to bar disclosure of records. The Act was designed to promote disclosure, not withholding.[20]

II

THE TRADE SECRETS ACT PROVIDES NO BASIS FOR ENJOINING THE DISCLOSURE OF INFORMATION PURSUANT TO AGENCY REGULATION

A. DISCLOSURE OF AGENCY RECORDS, PURSUANT TO OFCCP REGULATIONS, DOES NOT VIOLATE THE TRADE SECRETS ACT

1. Disclosure of agency records is "authorized by law" within the meaning of the Trade Secrets Act if it is authorized by agency regulations

Under the Trade Secrets Act, 18 U.S.C. 1905, a federal employee or officer is subject to criminal penalties for disclosing trade secrets or other types of business information "in any manner or to any extent not authorized by law." Petitioner argues (Br. 45)

[20] Petitioner relies on *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, in support of its contention that an implied right to enjoin disclosure should be found in the FOIA. But *Bannercraft* posed the question of the availability of an equitable remedy to promote a right clearly created by the statute. See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290–292; *Porter* v. *Warner Holding Co.*, 328 U.S. 395. The question in this case is not one of remedy, but one of right; *i.e.*, whether the FOIA provides the right petitioner claims it does. As to that question, the doctrine that equitable power is generally available to enforce a recognized right has no applicability.

that only a statute can create "authorization by law" and so permit disclosure. Thus, according to petitioner, even if valid regulations permit disclosure of information falling within the substantive reach of Section 1905, it would still be a criminal offense for an agency employee to release the information.[21] The language and prior construction of Section 1905 and its predecessors indicate, however, that the phrase "authorized by law" embraces forms of legal authorization other than statutes.

Petitioner's suggestion that only a statute can authorize disclosure of materials falling within the reach of Section 1905 runs afoul of a decision of this Court. In *Blair* v. *Oesterlein Co.*, 275 U.S. 220, the Court construed Rev. Stat. 3167, the principal predecessor of Section 1905. That statute prohibited disclosure by tax collection agents of information gained in the course of their duties "in any other manner than may be

[21] Petitioner also asks the Court to rule that Section 1905 is among the nondisclosure statutes embraced by exemption 3 to the FOIA, 5 U.S.C. 552(b)(3) (Br. 56–61). It is unnecessary for the Court to reach this question, which was not addressed by either court below. The combination of exemption 3 and Section 1905 would forbid disclosure only if Section 1905 does so alone, because exemption 3 simply states that other statutes provide authority to withhold. Consequently, if disclosure pursuant to agency regulations is "authorized by law" under Section 1905, disclosure of materials falling within its reach is permissible, whether or not it is among the statutes covered by exemption 3.

provided by law." [22] The Court held that the "provided by law" language was not to be given a narrow reading, but encompassed disclosures "made in obedience to process lawfully issued in a judicial or quasi-judicial proceedings" (*id.* at 227). Similarly, courts have held that disclosure is not unlawful under Section 1905 if the information is discoverable under the Federal Rules of Civil Procedure,[23] and the Attorney General has concluded that the phrase "authorized by law" is not limited to disclosures "specificially authorized by law" but also includes disclosures that may be "necessary or appropriate" for the agency to carry out its statutory responsibilities. 41 Op. Atty Gen. 166, 168, 169 (1953). See also *id.* at 221, 228 (1955).

Moreover, it has long been acknowledged that administrative regulations consistent with the agencies' substantive statutes have the force and effect of law.[24] Therefore, authorization by regulation is authorization "by law." See *Laughlin* v. *United States,* 474 F. 2d 444, 453 n. 12 (C.A. D.C.); *General Services Administration* v. *Benson,* 415 F. 2d 878, 880 (C.A.

[22] At the time of the decision in *Blair*, Rev. Stat. 3167 was codified as 18 U.S.C. 216.

[23] *Exchange National Bank* v. *Abramson*, 295 F. Supp. 87 (D. Minn.), appeal dismissed, 407 F. 2d 865 (C.A. 8); *Pleasant Hill Bank* v. *United States*, 58 F.R.D. 97 (W.D. Mo.).

[24] See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 536; *United States* v. *Nixon*, 418 U.S. 683, 695; *Free* v. *Bland*, 369 U.S. 663; *United States* v. *Mersky*, 361 U.S. 431, 437–438; *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542–543; *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349; *Caha* v. *United States*, 152 U.S. 211.

9); *Smith* v. *United States,* 305 F. 2d 197 (C.A. 9). On the basis of this principle, all the courts of appeals that have reached the issue have concluded that disclosure is "authorized by law," within the meaning of Section 1905, when the authorization is contained in agency regulations.[25]

Petitioner's contention that agency regulations cannot authorize the disclosure of materials otherwise protected by Section 1905 rests on the premise that Section 1905 is a legislative curb on agency action rather than a prohibition against unauthorized conduct by individual federal employees (Br. 43–44). In fact, the opposite appears to be the case.

Our analysis starts with the language of the statute. Section 1905 does not restrain agency action directly. It does not instruct agencies how to conduct their business, but instead provides a criminal penalty for agency employees who make unauthorized disclosures of restricted information. The focus of the statutory language on individual (rather than agency) conduct

[25] *Sears, Roebuck & Co.* v. *Eckerd*, *supra*, 575 F. 2d at 1200; *General Dynamics Corp.* v. *Marshall*, *supra*, 572 F. 2d. at 1217; *Westinghouse Electric Corp.* v. *Nuclear Regulatory Commission*, 555 F. 2d 82 (C.A. 3). In *Westinghouse Electric Corp.* v. *Schlesinger*, *supra*, the court did not consider whether the agency regulations could make disclosures "authorized by law" under Section 1905. In *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, *supra*, the court concluded that the regulations at issue there did not provide the requisite authorization for disclosure, but it did not reach the question whether the "authority by law" in Section 1905 could be provided by appropriate regulations.

is consistent with the legislative background of Section 1905, which indicates that the non-disclosure provision was intended to protect the public from abuses of office by individual employees who found they could profit personally by disclosing confidential materials to which they obtained access in the course of their work.

The principal precursor of Section 1905 is Rev. Stat. 3167, a criminal provision initially enacted in 1896 to bar unauthorized disclosure of certain business information by revenue officers. 13 Stat. 238. The language of the statute indicates that it was designed to abate individual misconduct by revenue agents, not to affect agency disclosure policies.[26] As codified in the

[26] The legislative history of Rev. Stat. 3167 is quite spare. However, the contemporaneous congressional concern about whether taxing authorities should be permitted to examine confidential corporate books and records suggests that the purpose of the non-disclosure statute was to minimize, if possible, the abuses that could follow from permitting "every little petty [revenue] officer * * * to * * * institute an investigation into the private affairs of the citizen." 66 Cong. Globe, 38th Cong., 1st Sess. 2997 (1864). When Rev. Stat. 3167 was re-enacted in the Tariff Act of 1894, 28 Stat. 509, similar concerns were expressed about the invasion of private rights of confidentiality. Senator Aldrich voiced a widely held concern when he suggested that poor pay and widespread venality among revenue officers would pose a grave danger to the continued confidentiality of business information (26 Cong. Rec. 6893 (1894)): "[A]ll the books of every corporation doing business in the United States [would be opened] to an unnumbered army of revenue agents. If places were offered for sale an applicant could afford to pay any amount of money to be selected for the position of making these examinations. The secrets of the business of every corporation are practically to be made known to competi-

Revised Statutes of 1878, the provision read:

> If any collector or deputy collector, or any inspector, or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine of not exceeding one thousand dollars, or to be imprisoned for not exceeding one year, or to both, at the discretion of the court, and shall be dismissed from office, and be forever thereafter incapable of holding any office under the Government.

After numerous re-enactments, Rev. Stat. 3167 was consolidated in 1948 with two more recently enacted statutes and codified as the Trade Secrets Act, 18 U.S.C. 1905. Act of June 25, 1948, Section 1905, 62 Stat. 791; see H.R. Rep. No. 304, 80th Cong., 1st Sess. A127–A128 (1947). The two other statutes were 19 U.S.C. (1940 ed.) 1335, a non-disclosure statute ap-

tors or made public by this provision. * * * [Corporate secrets] are to be turned over to the tender mercies of poorly paid revenue agents."

Petitioner finds significance (Br. 44–45) in Congress' amendment of a different section of the revenue statutes, dealing with the authority of revenue agents to administer oaths. Rev. Stat. 3165. That provision had originally permitted revenue officers to administer oaths when "authorized by law." In 1878 it was amended to provide that revenue officers could administer oaths as "authorized by law or regulations authorized by law." The legislative history of this amendment indicates, however, that it was added merely to make clear that the Commissioner of Internal Revenue could issue regulations authorizing revenue agents to administer oaths. 7 Cong. Rec. 4005–4006 (1878).

plying to the Tariff Commission,[27] and 15 U.S.C. (1940 ed.) 176a, a non-disclosure provision applying to the Department of Commerce.[28] The Tariff Commission statute tracked Rev. Stat. 3167 in large measure, but the Commerce Department statute was quite different. Unlike the other tax and tariff statutes, the Commerce Department provision did not focus on unauthorized disclosures by government officials; it imposed restrictions directly on the agency. Moreover, unlike the other two statutes, the Commerce Department provision contained no criminal penalties and, most significantly, it contained no exception for disclosures "authorized by law."

In 1948, when it consolidated and codified the old statutes, Congress employed the formulation from Rev.

[27] 39 Stat. 756, 19 U.S.C. (1940 ed.) 1335, provided in pertinent part:

"It shall be unlawful for any member of the [Tariff] commission, or for any employee, agent or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commission * * *."

[28] 52 Stat. 8, 15 U.S.C. (1940 ed.) 176a, provided:

"Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data."

Stat. 3167 and the Tariff Commission statute; it discarded the formulation employed in the Commerce Department statute. The surviving language establishes criminal penalties for individual employees rather than general rules for agencies, and it permits disclosures that are "authorized by law."[29]

Shortly after it was codified as Section 1905, Rev. Stat. 3167 was also incorporated, in slightly different form, in the Internal Revenue Code of 1954, where it was codified as 26 U.S.C. 7213(b). Like Section 1905, that statute was criminal, it was addressed to individual agents rather than to the agency as a whole, and it permitted disclosures "authorized by law." Courts uniformly construed Section 7213(b) to permit agency regulations to authorize disclosures. *Laughlin* v. *United States, supra; Smith* v. *United States, supra.*[30]

[29] In a comprehensive study of the legislative history of the Trade Secrets Act, one scholar has concluded that the scope of the Act should be limited to the scope of its three precursors. Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 607–616 (1977). Although, in the course of codification in 1948, Congress altered the language of the Act to cover materials arguably not encompassed by any of the precursor statutes, no legislative history indicates that Congress intended to create a rule of greater secrecy. Whatever the merit of Clement's argument (see *Muniz* v. *Hoffman*, 422 U.S. 454, 467–474), it is not directly applicable to this case because the Department of Labor has applied the terms of Section 1905 to its own officers and employees. 29 C.F.R. 70.21(a).

[30] Any doubt about whether Section 7213(b) had permitted agency regulations to provide the authorization for disclosures

The legislative background of Section 1905 and the related statute thus support the view that the statute does not restrain formal agency action. Other considerations point in the same direction. Section 1905 is a criminal statute, and ambiguities in the scope of its prohibition should be resolved against a broad view that is not supported by the legislative history. Compare *Adamo Wrecking Co.* v. *United States*, No. 76–911, decided January 10, 1978, slip op. 9, with *Scarborough* v. *United States*, 431 U.S. 563, 577. This principle applies even though this case is not a criminal proceeding. See *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296.[31] On petitioner's view of the statute, a subordi-

was dispelled in 1976, when Congress amended that provision for the specific purpose of restricting the exceptions to the nondisclosure rules to those authorized by statute. Pub. L. 94–455, Title XII, Section 1202(h)(3), 90 Stat. 1686, 1688. The provision now permits disclosures only as "authorized in this title." The Conference Report states that the statute was amended to assure "that returns and return information are to be kept confidential except as specifically provided by statute." H.R. Conf. Rep. No. 94–1515, 94th Cong., 2d Sess. 475 (1976). The clear implication is that "authorization by law" and "authorization by statute" are quite different things.

[31] *Federal Communications Commission* v. *Pacifica Foundation*, No. 77–528, decided July 3, 1978, slip op. 10–11 n. 13, is not to the contrary. There the Court noted that, although 18 U.S.C. 1464 is a criminal statute, its terms were independently incorporated in the provisions of the Radio Act of 1927 and the Communications Act of 1934, and the construction of the language in those civil statutes did not necessarily govern the construction of the same language in the criminal statute. Here, by contrast, the Court is faced with the construction of a single, criminal statute.

nate employee of a federal agency could be convicted of violating Section 1905 if the agency's regulations authorized—or even required—disclosure of the materials in question. The harshness of this result provides further support for resolving any ambiguity in the language of Section 1905 in favor of the reading of the phrase "authorized by law" that we have advanced here.

2. The disclosure regulations were issued under appropriate authority

The Secretary of Labor, in promulgating the OFCCP disclosure regulations, stated that they were being issued under the authority of Executive Order 11246, as amended, and 29 C.F.R. 70.71, which permits the issuance of supplemental regulations governing the disclosure of records by particular units within the Department of Labor. 38 Fed. Reg. 3192–3193. The OFCCP disclosure regulations also are valid under 5 U.S.C. 301, the executive departments' "housekeeping statute."

a. Executive Order 11246 provides authority for the OFCCP disclosure regulations

Section 201 of Executive order 11246 provides that, in the exercise of his responsibility to administer the portions of the order applying to government contractors, the Secretary of Labor "shall adopt rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof."

Petitioner does not contend that the OFCCP disclosure regulations are not "necessary and appropriate" measures to achieve the purposes of the Executive Order, nor does petitioner argue that the Executive Order could not provide the basis for the issuance of disclosure regulations generally.[32] Instead, petitioner's argument is that although the Secretary purported to base the disclosure regulations on the Executive Order, the regulations state that they "implement * * * the Freedom of Information Act" (41 C.F.R. 60–40.1) and therefore are not, in fact, supported by the authority granted in the Executive Order. In addition, returning to the contention that Section 1905 absolutely bars disclosure of materials falling within its purview unless another statute authorizes disclosure, petitioner argues

[32] It is well established that the Executive Order has the force and effect of law. *United States* v. *New Orleans Public Service, Inc.*, 553 F. 2d 459, 465 (C.A. 5), on rehearing, 559 F. 2d 30, vacated on other grounds, June 5, 1978 (No. 77–497); *Southern Illinois Builders Association* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill.), affirmed, 471 F. 2d 680 (C.A. 7); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Farkas* v. *Texas Instruments, Inc.*, 375 F. 2d 629 (C.A. 5), certiorari denied, 389 U.S. 977; see generally *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL–CIO* v. *Austin*, 418 U.S. 264, 273 n. 5. Regulations issued under the authority of the Executive Order, like regulations issued under an authorizing statute, are valid if within the scope of the order. See also Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972), which discusses the history of and authority for Executive Order 11246.

that the Executive Order cannot provide a basis for authorizing the release of such materials.[33]

As to the first contention, we believe that the regulations could be sustained as implementing the FOIA. The Act refers to published agency rules stating the time, place, fees, and procedures for the disclosure of materials covered by the Act. 5 U.S.C. 552(a)(3). The OFCCP regulations deal with both materials that must be produced under the Act and materials that are disclosed as a matter of discretion; they set forth "the places at which and the procedures whereby

[33] Petitioner also refers to the fact that the OFCCP disclosure regulations were not formally promulgated as legislative rules (see 38 Fed. Reg. 3193); it apparently contends that this circumstance buttresses its argument that the regulations do not adequately authorize disclosure.

There are several answers to this suggestion. First, although "interpretive" rules cannot extinguish rights of persons affected by agency action, see *Morton* v. *Ruiz*, 415 U.S. 199, 236, the regulations in this case do not have that effect. They simply announce that disclosures of certain kinds are in accordance with agency policy and do not subject agency employees and officers to criminal liability under Section 1905. See *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674. Second, even if it were necessary that regulations satisfy the requirements of 5 U.S.C. 553 in order to provide legal authorization for disclosure of materials falling within the reach of Section 1905, those standards were met here. While the Secretary of Labor stated that the notice and comment requirements of Section 553 were not technically applicable, he added that "[i]n accordance with the spirit of the public policy set forth in 5 U.S.C. 553," the requirements of that section would be compiled with, and comments on the disclosure regulations would be evaluated and acted on "in the same manner as if this document were a proposal." 38 Fed. Reg. 3193.

members of the public may obtain access to and inspect and copy information from records in custody of the OFCC[P] and the compliance agencies" (41 C.F.R. 60–40.1). Accordingly, the regulations "implement" the FOIA.

Beyond this, however, the text of the regulations makes it plain that they are based on the authority of the Executive Order, as the Secretary expressly stated (38 Fed. Reg. 3193), and not solely on the FOIA. The portion of the regulations setting out their "purpose and scope" explains (41 C.F.R. 60–40.1):

> It is the policy of the OFCC[P] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment.

The purpose of the Executive Order is to combat discrimination in employment, and a disclosure policy designed to further this purpose is consistent with the Executive Order and an appropriate subject for regulation under its aegis. See *Federal Communications Commission* v. *Schreiber, supra,* 381 U.S. at 291–294.

Petitioner's reliance on Section 1905 is circular. If Section 1905 permits disclosure of materials whose release is authorized by regulation, as we have argued above, then that statute cannot be read to bar the promulgation of regulations permitting such disclosure. Moreover, although a Department of Labor regulation, 29 C.F.R. 70.21, incorporates the provisions of Section 1905 verbatim, the OFCCP disclosure regulations provide the legal authorization that permits disclosure under 29 C.F.R. 70.21, just as they do for the purposes of Section 1905.[34]

b. The OFCCP disclosure regulations are authorized by the executive housekeeping statute, 5 U.S.C. 301

The "housekeeping statute," 5 U.S.C. 301, provides that the head of each executive department can prescribe regulations governing departmental matters, including the "custody, use, and preservation of [the department's] records, papers, and property." Regulations promulgated under the housekeeping statute are valid unless they plainly violate the law or are palpably inappropriate to the legislative design. *Boske* v. *Comingore*, 177 U.S. 459. Departmental regulations, moreover, can properly authorize disclosure of information, even if the information is assertedly confidential. See *Federal Communications Commission* v. *Schreiber, supra,* 381 U.S. at 291–294; *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 321–322. Accordingly, the OFCCP disclosure regulations are supported by the authority granted to the Department of Labor to regulate the "custody [and] use of its records [and] papers." [35]

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[34] The OFCCP disclosure regulations properly supplement the general Department of Labor disclosure regulations. A regulation on which the Secretary expressly relied in promulgating the OFCCP disclosure regulations, 29 C.F.R. 70.71, provides for such supplementary regulations.

[35] Although the Secretary did not expressly invoke 5 U.S.C. 301 as a source of his power to issue the regulations here at issue,

Against the force of this line of authority, petitioner relies on the legislative history of a 1958 amendment to Section 301 (Br. 48–51). The reliance is unwarranted.

As petitioner points out (Br. 48), Section 301 or its predecessors have been in effect since 1789. In 1958, Congress amended the Act to add the final sentence, which provides that the Act "does not authorize withholding information from the public or limiting the availability of records to the public" (72 Stat. 547). That sentence was added because of congressional discontent with the agency practice of invoking Section 301 as authority to withhold information from the public. See S. Rep. No. 1621, 85th Cong., 2d Sess. 2 (1958).

Representative Moss, the sponsor of the legislation, stated that the amendment would not undermine "any other statutory authority which confers upon the departments and agencies of Government the right to withhold information." 104 Cong. Rec. 6549 (1958). The new sentence was designed, he said, to stop the practices of federal departments and agencies that had "tortured this language [of Section 301] into a broad authority to withhold information from the public and even from the Congress itself." *Ibid.* In a statement heavily relied upon by the petitioner, Rep. Moss added that the legislation would "not affect the

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the regulations nonetheless can be sustained under that authority. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766–767 n. 6 (plurality opinion).

confidential status of information given to the Government and carefully detailed in Title 18, United States Code, Section 1905." *Id.* at 6550.

Petitioner maintains that Rep. Moss's statement means that Section 301 does not provide the authority for any regulation permitting disclosure of materials falling within the reach of Section 1905. The context of the statement, however, suggests quite a different meaning. Rep. Moss was referring only to the final sentence, which was the legislation before the House. Thus, rather than suggesting that Section 301—and any regulations that might be enacted under its authority—could not authorize disclosure of materials within the reach of Section 1905, Rep. Moss meant that the prohibition against using Section 301 to justify withholding would not repeal or interfere with Section 1905 or any other withholding statute.[36]

Petitioner also relies on a statement by Representative Meader that Section 301 "was not intended to deal with the authority to release or withhold information or records" (104 Cong. Rec. 6562 (1958)). Petitioner contends that Rep. Meader meant to suggest that Sec-

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[36] At all events, there is no indication that any other Member of Congress agreed with Rep. Moss's statement of the effects of the new legislation. The remark of a single legislator—even the sponsor of a bill—is not particularly reliable as an indication of the intent of Congress. See *Chandler* v. *Roudebush*, 425 U.S. 840, 859 n. 36. Certainly nothing in the 1958 debates indicates that Congress as a whole intended the amendment, which bars the use of Section 301 to withhold information, also silently to prohibit the use of Section 301 to disclose information. The general design was to promote disclosure, not to restrict it.

tion 301 was not intended to authorize regulations permitting disclosure of agency information. Again, the context of the statement makes it clear that Rep. Meader was not addressing the legitimacy of agency disclosure regulations under Section 301 but was instead protesting the agency practice of relying on Section 301 to withhold information from the public. His statement was made in the course of offering an amendment to Section 301 that would have added the proviso that "no regulation shall be prescribed under this section authorizing or directing the withholding of information from the public or limiting the availability of records to the public." 104 Cong. Rec. 6562 (1958). The amendment was entirely pro-disclosure.

More pertinent to the understanding of the authority of agencies to disclose information under Section 301 are the remarks of Representative Fascell in response to another proposed amendment, which would have provided that Section 301 should not be construed to require that agencies make records available. Rep. Fascell opposed that amendment, stating (104 Cong. Rec. 6569 (1958)):

> The only correct interpretation of the existing law is that the head of the department * ** * has been given the right to prescribe rules and regulations dealing with the custody, use and preservation of the records * * * [I]f you adopt the proviso in the amendments which are suggested you raise the contrary presumption that he shall not have the right to make information and records available. This is why the amendment should be defeated.

The roll was then called and the amendment to the Moss bill rejected. *Id.* at 6573.

In sum, the legislative history of the 1958 amendment to Section 301, to the extent that it sheds any light on the issue, supports the natural reading of Section 301 as authorizing regulations permitting discretionary agency disclosure of records.

B. THE TRADE SECRETS ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION TO ENJOIN DISCLOSURE

Even if the OFCCP disclosure regulations do not provide legal authorization for disclosure under the Trade Secrets Act, it does not follow that petitioner has the right to an injunction against any disclosure. Section 1905 is a criminal statute, and it creates no private right of action.

Ordinarily, private parties cannot enforce criminal statutes. It makes little difference in practice whether this is so because they do not authorize a private civil remedy (see *Cort* v. *Ash, supra*, 422 U.S. at 78–80); because the injured party lacks standing (see *Linda R. S.* v. *Richard D.*, 410 U.S. 614); or because equity will not enjoin the commission of a crime (Chafee and Re, *Equity* 935–954 (5th ed. 1967)).[37] Although this Court on occasion has held that a particular criminal statute implicitly creates a private right of action, the Court has observed that in each instance there has been "a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Cort*

[37] But see *In Re Debs*, 158 U.S. 564.

v. *Ash, supra,* 422 U.S. at 79.[38] Section 1905 offers no similar "statutory basis."

The protection of private interests in confidentiality undoubtedly was one of the purposes that underlay Section 1905, although the genesis of the statute primarily was Congress' desire to prevent revenue officers from misusing their offices for personal advantages (see pages 39–45, *supra*). Nonetheless, there is no "indication of legislative intent, explicit or implicit, * * * to create * * * [a private] remedy." *Cort* v. *Ash, supra,* 422 U.S. at 78. Moreover, although vigorous enforcement of Section 1905 might provide a benefit to all persons whose business information may from time to time come into the hands of government agents, that category of persons is not a " 'class for whose *especial* benefit the statute was enacted' " (*ibid.,* quoting *Texas & Pacific R. Co.* v. *Rigsby, supra,* 241 U.S. at 39). The beneficiaries of Section 1905 include the public at large, and every business enterprise, any one of which may be a victim of the assertedly unlawful conduct.

Perhaps most significantly, a private right of action to enjoin disclosure should not be implied in favor of petitioner and others similarly situated because petitioner has another adequate remedy. In *Cort* v. *Ash,*

[38] The three cases in which the Court found implied rights of action in criminal statutes all involved statutory schemes that led irresistably to a private right of action or provided for some civil remedies, leaving only the question whether additional remedies (beyond those mentioned) were available. See *Cort* v. *Ash, supra,* 422 U.S. at 79–80 and n. 11.

supra, 422 U.S. at 78, the Court noted that when the availability of relief for the kind of injury complained of is governed by another statutory scheme (in that case, by state law), there is little reason to imply a remedy for violation of a federal criminal statute. See also *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 394–395; *id.* at 400 (Harlan, J., concurring). The Administrative Procedure Act provides a means by which petitioner may obtain judicial review of any proposed disclosure of assertedly confidential materials. In an Administrative Procedure Act case, moreover, the plaintiff can resist disclosure on the ground that it would violate legally protected interests in confidentiality—the same claim that it would raise in the context of a suit for an injunction under the implied authority of Section 1905. Accordingly, petitioner's contentions properly should be considered in an administrative review proceeding, not in an injunctive action based on an implied private right of action to enforce the criminal provisions of Section 1905.[39]

[39] Petitioner suggests (Br. 24 n. 26) that disclosure assertedly confidential information should be forbidden for the additional reason that it would be a "taking of property" without just compensation. In our view this argument is frivolous. But it is unnecessary for the Court to address the contention, because petitioner can assert its "taking" argument in a suit under the Tucker Act, 28 U.S.C. 1491. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* No. 77–262, decided June 26, 1978, slip op. 32 n. 39; *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 125–136. The Tucker Act, moreover, is another remedy available in lieu of an implied cause of action.

III

JUDICIAL REVIEW OF AN AGENCY DECISION TO DISCLOSE RECORDS IS AVAILABLE ONLY ON THE ADMINISTRATIVE RECORD UNDER THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT

Judicial review of final agency action ordinarily is conducted under the Administrative Procedure Act (APA). *Dunlop* v. *Bachowski,* 421 U.S. 560; *Camp* v. *Pitts,* 411 U.S. 138; *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402. The standards of APA review are set out in Section 10(e) of the Act, 5 U.S.C. 706. Under Section 10(e), an agency's action is not subject to *de novo* judicial factfinding or review except in extraordinary cases.[40] *Camp* v. *Pitts, supra,* 411 U.S. at 141–142; *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 413–414. No statute indicates that Congress intended to preclude judicial review, under the APA, of decisions to disclose information. Petitioner therefore is "entitled to judicial review" of its contention that it is "suffering legal wrong because of agency action" (5 U.S.C. 702), but that review should not be *de novo.*[41]

[40] This rule is fortified by the presumption against *de novo* review of agency action. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619 n. 17; *United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709, 715; see also *Chandler* v. *Roudebush,* 425 U.S. 840, 861–862.

[41] Petitioner maintains that the FOIA and the Trade Secrets Act create an implied right of action under which it is entitled to *de novo* consideration of a disclosure decision (Br. 62–69), but this argument fails because, as we have shown at pages 32–36 and 53–55, *supra,* neither the FOIA nor the Trade Secrets Act creates a private right of action. Accordingly, review is available to petitioner only under the Administrative Procedure Act.

Petitioner contends (Br. 69-72) that it is entitled to *de novo* review in the district court under the APA because, if material falls within exemption 4 or if its disclosure would violate Section 1905, there is no room for agency discretion to release it. That argument, of course, fails if the Court rejects petitioner's contention that some statute requires withholding. If we are correct that exemption 4 is permissive rather than mandatory and that agency regulations can permit release of information otherwise within the reach of Section 1905, then the disclosure decision would be subject to agency discretion, and review of the exercise of that discretion would be controlled by 5 U.S.C. 706(2)(A), which permits a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42]

Petitioner also contends (Br. 72–81) that there should be *de novo* review of agency disclosure determinations because the fact finding procedures employed by agencies in responding to FOIA disclosure requests are inadequate. Petitioner argues that "the constraints imposed on the agencies by the FOIA itself" (Br. 74)—particularly the short time period

[42] If, as petitioner argues, either exemption 4 or 18 U.S.C. 1905 forbids disclosure, that prohibition can be enforced on judicial review under Section 706(2)(A). There is no reason why the content of the substantive legal rule should affect the procedures for judicial review. Petitioner's arguments show why, in its view, it should win on the merits, not why it is entitled to *de novo* review.

within which an agency must determine whether to comply with a disclosure request—preclude adequate agency decision making.

Under the FOIA an agency generally must determine within 10 days of the receipt of a disclosure request whether it will comply with the request. 5 U.S.C. 552(a)(6)(A)(i). In Congress' judgment this period is sufficient to enable an agency to determine whether the FOIA requires disclosure. Petitioner's contention that the time period is too short for informed consideration is thus contrary to the congressional judgment. Because Congress evidently does not share petitioner's assessment of the efficacy of the 10-day period, it would be inappropriate to conclude that the FOIA creates an exception to the standards of the APA.

In any event, the time constraints on agency action are not as rigid as petitioner suggests. The FOIA expressly provides that in "unusual circumstances" an agency may take an additional 10 working days to determine whether to disclose requested materials (5 U.S.C. 552(a)(6)(B)). In addition, if the agency can show that "exceptional circumstances" exist, and that it is exercising due diligence to process disclosure requests expeditiously, a court may allow the agency additional time beyond the time limits prescribed in 5 U.S.C. 552(a)(6)(A). See *Open America* v. *Watergate Special Prosecution Force,* 547 F. 2d 605, 616 (C.A. D.C.). Moreover, once the agency makes the initial determination that requested material is within the scope of one of the exemptions, the provisions of the FOIA, including the 10-day disclosure rule, "do[]

not apply." 5 U.S.C. 552(b). Thus, if the agency concludes that more than 10 days are required to determine whether exempt material should be disclosed as a discretionary matter under agency regulations, the agency is free, under the FOIA, to take as much time as it needs to consider the factors bearing on whether disclosure should be ordered.[43] The agency's refusal to consider the submitter's views or to permit the submitter a reasonable opportunity to voice its objections to discretionary disclosure could constitute a ground for challenging the agency's decision as arbitrary, capricious, or an abuse of discretion. See *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 416. Finally, if a decision is actually made without gathering the necessary information or considering essential facts, a court could remand the case to the agency for additional consideration, as this case demonstrates (Pet. App. 38a–40a). *De novo* review is not necessary.

Petitioner further contends that agency fact-finding procedures are inadequate because the agencies possess insufficient expertise with respect to the potential competitive injury that could result from disclosure of confidential business information. The

[43] The OFCCP disclosure regulations provide that contractors should, at the time of submission, identify materials that they regard as confidential and state why the materials should not be disclosed. 41 C.F.R. 60–60.4(d). This enables the agency to know, prior to any FOIA request, why the submitter believes particular materials should be withheld.

courts, however, are no better suited to determine whether disclosure of particular information would result in competitive harm. Indeed, since the agencies are generally familiar with the detailed operations of the industries they regulate, the agencies are more likely to be able to make informed judgments about the benefits of preserving confidentiality of particular material. Companies resisting disclosure are free, of course, to present the same information to the agency that they would present to a court on *de novo* review in support of their contention that the disclosure of particular material would result in substantial competitive harm. Again, if an agency should refuse to consider such presentations, or should arbitrarily disregard them, the agency's conduct could provide a basis for challenging its decision.

Petitioner's final point is that the agency fact-finding process is inadequate because the agencies are not required to, and do not, make sufficient findings in the course of ordering disclosure to permit informed judicial review. But an agency has no general obligation to write an opinion in response to every request made of it (*Renegotiation Board* v. *Grumman Aircraft Engineering Corp., supra,* 421 U.S. at 191–192), and the absence of an opinion thus could not make the APA's judicial review provisions inapplicable. The agency's failure to create an administrative record sufficient to permit judicial review may be a basis on which the agency's action can be challenged in court,

but it is not a reason to change the standard of judicial review.

This case illustrates our argument. The court of appeals hald that the administrative record is "not sufficient[] [to] disclose the basis for the agency determination that the FOIA exemptions are inapplicable" and does not show "that, or why, such disclosure would be in the public interest" (Pet. App. 39a–40a). We have not challenged the remand, and the decision of the court of appeals provides ample indication that review under the standards of 5 U.S.C. 706(2)(A) enables courts to require agencies to discharge their responsibilities under the administrative process.[46]

[46] We do not imply that judicial proceedings under Section 706 after remand would afford petitioner another opportunity to argue that exemption 4 or 18 U.S.C. 1905 absolutely bars disclosure. Moreover, APA review does not authorize courts to second-guess the wisdom of particular disclosure decisions. Review under the APA is limited to contentions that the plaintiff is "suffering legal wrong" (5 U.S.C. 702) because of agency action. It is therefore necessary for a court to identify a source of "legal wrong" before it may grant relief.

If the Court should agree with our arguments about exemption 4 and 18 U.S.C. 1905, and with our contention that the OFCCP disclosure regulations are supported by authority to issue regulations, then disclosure could cause petitioner "legal wrong" in only two ways, First, petitioner could argue that the regulations, although authorized, are arbitrary in particular provisions; second, petitioner might argue that the agency did not comply with the OFCCP regulations in deciding to disclose the documents. See *Board of Curators* v. *Horowitz*, No. 76–695, decided March 1, 1978, slip op. 13 n. 8. The court of appeals has not foreclosed either of these possible arguments, although the reasoning that we have advanced here for permitting federal agencies to disclose information, if accepted, doubtless would make it difficult for petitioner to prevail on the first argument.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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